**The Waterbury Hospital *and* Connecticut Health Care Associates, District 1199, National Union of Hospital & Health Care Employees, AFL–CIO.** Case 39–CA–3315

December 21, 1990

## DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 22, 1990, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the judge's recommended Order as modified.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, the Waterbury Hospital, Waterbury, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

''(c) Post at its hospital facility in Waterbury, Connecticut, copies of the attached notice marked ''Appendix.''[104] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[1] No exceptions have been filed to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by granting strike replacements and crossovers superseniority for a 12-month period following the conclusion of the strike, and his findings that the complaint allegations are neither barred by Sec. 10(b) nor appropriate for deferral to the grievance-arbitration machinery of the parties' collective-bargaining agreement.

*Michael A. Marcionese, Esq.*, for the General Counsel.
*G. Bradford Palmer, Esq.* and *Floyd J. Dugas, Esq. (Carmody & Torrance, Esqs.)*, of Waterbury, Connecticut, for the Respondent.
*Barbara J. Collins, Esq. (Gagne & Associates)*, of Hartford, Connecticut, for the Union.

## DECISION

### STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge filed with the Board on December 31, 1986, by Connecticut Health Care Associates, District 1199, National Union of Hospital & Health Care Employees, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board, by the Officer-In-Charge for Subregion 39, Hartford, Connecticut, issued a complaint and notice of hearing on October 29, 1987, against The Waterbury Hospital (the Respondent) alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1] On November 30, 1987, the Respondent, by counsel, filed an answer denying the material allegations in the complaint.

A hearing was held before me in Hartford, Connecticut, on April 11, 12, 13, 14, 15, 26, and 27, 1988. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. At the hearing, the complaint was amended to delete the General Counsel's request for the inclusion of a visitatorial provision as part of any remedial order issued in this case. Counsel for the General Counsel moved to amend the complaint further, to specifically allege that the Respondent discriminatorily awarded preference in scheduling hours of work and shifts to nonstriking employees in the hemodialysis department. I denied this motion. Moreover, at the opening of the hearing the Respondent, in writing, moved for '' Dismissal and/or Partial Summary Judgment'' of paragraph 11 of the complaint, on the grounds that the alleged denial of reinstatement to strikers was barred by Section 10(b) of the Act, and of paragraph 9 of the complaint on the grounds that the alleged grant of superseniority to nonstrikers was moot. I reserved decision on these motions. At the conclusion of the hearing the Respondent renewed its previous motions and additionally moved to dismiss the complaint for failure to state a cause of action and for the Board to defer to arbitration in this matter. I reserved decision on these motions as well. Thereafter the General Counsel and the Respondent filed briefs.[2] For the reasons appearing hereinafter, I deny the Respondent's above motion in their entirety. On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, has been a Connecticut corporation with its office and principal place of business in Waterbury, Connecticut, engaged as a health care institution in the operation of a hospital providing inpatient and outpatient medical and professional care services. In the

[1] On November 19, 1987, in response to a motion for more definite statement filed by the Respondent, the General Counsel identified the strikers alleged to have been unlawfully denied reinstatement as those strikers whose prestrike positions at the hospital were awarded to nonstriking employees who were not physically performing the duties of the position on a permanent basis as of the conclusion of the strike.

[2] The Union filed a brief statement adopting ''verbatim the post-hearing brief submitted by the General Counsel.''

course and conduct of its business operations during the preceding 12 months, these operations being representative of its operations at all times material, the Respondent derived gross revenues in excess of $250,000, and purchased and received at its hospital facility products, goods, and materials valued in excess of $250,000 directly from points outside the State of Connecticut. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges, the Respondent admits, and I find that Paul Hefferman, director of human resources, Janice H. Riding, assistant director of human resources, and Norma Shidlovsky, associate director of nursing, are now,[3] and have been at all times material, supervisors of the Respondent within the meaning of Section 2(11) of the Act, and agents of the Respondent within the meaning of Section 2(13) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that Connecticut Health Care Associates, District 1199, National Union of Hospital & Health Care Employees, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate to their former positions of employment certain of its employees who had engaged in a strike and on whose behalf the Union had made an unconditional offer to return to work, and by granting superseniority benefits in the form of preferences in terms and conditions of employment to employees who either did not engage in or abandoned the strike engaged in by employees represented by the Union. The Respondent denies these allegations.[4]

### A. *The Evidence*

The Respondent operates a nonprofit community hospital (Waterbury Hospital) with a 505-bed capacity, providing a wide range of inpatient and outpatient services in Waterbury, Connecticut. The Union has represented the Respondents nursing employees for many years in two separate bargaining units—one consisting of registered nurses (RNs), including assistant head nurses (AHNs), and the other consisting of all licensed practical nurses (LPNs).[5] The Respondent's service and maintenance employees are represented by a different affiliate of the same International Union, New England Health Care Employees Union, District 1199 (NEHCEU). In May 1986, the Respondent employed approximately 1800 employees, including 450 RNs, 150 LPNs, 500 service and maintenance workers with the remainder being nonunion employees. The patient census at Waterbury Hospital in the spring of 1986 was approximately 350–360 persons.

In early March 1986, the Respondent and the two unions commenced negotiations for new collective-bargaining agreements to replace the contracts due to terminate on May 31, 1986, but the parties were unable to reach agreement before these contracts expired. After strike notices were served on the Respondent by the Union and NEHCEU, the Respondent decided to close the hospital, transferring its patients to other facilities or sending them home where applicable, canceling surgical procedures and outpatient services, and laying off all its employees. When the contracts expired on May 31, 1986, the hospital was effectually ''fully shut down.'' NEHCEU commenced a strike against the Respondent on June 1, 1986 and the Union followed suit on June 4, 1986. However, negotiations between the parties continued and on June 23, 1986 the Respondent presented the Union with its final offer contingent upon the RNs and LPNs agreeing to return to work immediately. This offer was rejected by the Union and the strike continued.[6] Thereafter, no negotiation sessions were held between the parties until August 13, 1986, by which time the Respondent had reached agreement with NEHCEU for a bargaining contract covering the service and maintenance employees.[7] This agreement did not require the service and maintenance employees to return to work until the Respondent reached agreement with the Union regarding the RNs and LPNs.

Responding to concern for patients in need of prenatal care and prescription renewals and for those who did not have their own physicians, the Respondent opened its Chase Clinic sometime in mid-June 1986, and the following week, its One Day Surgery unit because of community need for surgical services. Both these units were staffed by managerial and/or supervisory nursing employees. Subsequently, in or about July 4, 1986, in response to pressure from its own staff doctors and continuing concern for the medical needs of the community, the Respondent decided to reopen the hospital completely.[8] Denise Shanahan, the Respondent's director of

[3] At the time of the commencement of this hearing, Norma Shidlovsky had retired from the Respondent's employ, effective November 13, 1987.

[4] In its answer, the Respondent alleges that:

> [S]ince on or about October 4, 1986, Respondent has not reinstated to their former positions of employment certain striking employees (at most two and each of whom was offered and accepted another comparable position) whose pre-strike positions had been awarded to replacements (including employees who abandoned the strike), who were not physically performing the duties of said position on a permanent basis as of the conclusion of the strike.

Moreover, the Respondent also asserts in its answer that the alleged grant of superseniority was part of a strike settlement agreement on October 3, 1986, which provided that ''any employees permanently employed and working in the nursing bargaining units on such date would not be subject to being bumped during the recall period of 12 months from the ratification date,'' and that such provision ''is now moot since the 12-month period has expired and no employee was laid off as a result of the operation.''

[5] Historically, the Union and the Respondent have negotiated collective-bargaining agreements for these two units concurrently with many items common to both contracts.

[6] Since the Respondent's final offer was conditioned on the immediate return to work of the RNs and LPNs, notwithstanding that agreement had not yet been reached with NEHCEU regarding the service and maintenance employees, the Union's acceptance of the offer would have required the RNs and LPNs to cross the picket lines of these employees in order to comply.

[7] According to the Respondent's witnesses, when the Union rejected its final offer of June 23, 1986, and indicated that the RNs and LPNs would not return to work until agreement was also reached with the service and maintenance employees, the Respondent ''turned its attention'' to the NEHCEU negotiations solely. There being no progress thereafter in the negotiations between the Respondent and NEHCEU despite government mediation efforts, in early July 1986 the Respondent declared an impasse in bargaining with both Unions. According to the General Counsel's witnesses the Respondent rejected efforts by the Union in July 1986 to resume negotiations with the Union.

[8] Norma Shidlovsky, the associate director of nursing at the time, testified that the Respondent's plan for reopening the hospital was first to reopen the

*Continued*

nurses at the time, testified that although the Respondent wanted its own nursing staff back at the hospital on reopening, because of the lack of progress in ending the strike in the foreseeable future the Respondent began advertising for RNs on July 13, 1986, and on September 3, 1986, for LPNs.[9]

On or about July 3 or 4, 1986, some of the striking nursing employees crossed the picket line and returned to work and the Respondent began hiring new nurses in mid-July 1986. The evidence indicates that the new nursing employees were hired for, and the crossovers were transferred to, whatever positions they requested or on whatever shifts they wanted, and although each nonstriking employee was hired for a specific job, they were told that if their hospital unit or department was not yet opened, or where hospital staffing needs dictated otherwise, they would be temporarily utilized in a different area or position until their specific job became available or the need ended.[10]

During the strike the Union published a strike newsletter and in its July 14, 1986 issue asserted that all the striking employees would be returned to their former positions at the end of the strike, bumping any newly hired employee or crossover who had taken their job during the strike. According to the Respondent's witnesses, both replacement nurses and some of the crossover nurses expressed concern to management regarding the permanency of their new positions after the strike ended.[11] In response to the Union's newsletter and employee concern, the Respondent issued its own letter dated July 16, 1986, to all nursing employees in which it assured the nonstrikers that their jobs were permanent and that they would not be displaced by the returning strikers at the conclusion of the strike.

Moreover, the Respondent required each newly hired or crossover employee to sign a letter of employment referred to as an ''individual contract'' in which it assured these nonstriking employees that their continuing employment was for a permanent designated position which they would retain ''regardless of how the labor dispute is finally resolved.''[12] The Respondent's witnesses conceded that some of these individual contracts were for positions in areas of the hospital which were not yet open.

When negotiations between the parties resumed on August 13, 1986,[13] the return to work of the striking nursing employees became a paramount issue because of the hiring of ''replacements'' by the Respondent. The Union proposed that all employees be returned to their prestrike positions.[14] Under this proposal, nursing employees who crossed the picket line and returned to work would be treated the same as the striking employees. The Union maintained that there were sufficient vacancies, both prestrike and those resulting from nurse resignations during the strike, to accommodate all of the newly hired employees. The Respondent would not agree to the Union's proposal asserting that it had a ''legal and moral'' commitment to the nonstriking nursing employees and therefore would not allow the ''bumping'' of any of these employees by the returning strikers. Paul Hefferman, the Respondent's director of human resources at the time and a member of its negotiating committee testified that this ''commitment'' extended to all nonstriking employees including those who had taken jobs in which they were not yet working, as well as to any future nonstriker hired while the strike was still in progress. The Union indicated that there would be no strike settlement without the Respondent's agreement to the Union's ''amnesty'' proposal.

The parties met again on August 18, 1986, with the Respondent submitting a return to work proposal providing for the recall of strikers on a ''census-driven'' basis.[15] This proposal also included a provision indicating that nothing in the settlement agreement would constitute a waiver of the parties' legal rights, nor preclude them from pursuing any civil or criminal remedies they may have in connection with the strike, a ''no waiver of rights'' clause. Representatives of the Respondent and the Union met again on August 19, 1986, and on that same day the Respondent's president, John Tobin, sent letters to all the nursing employees, both striking and nonstriking, with a copy of the U.S. Supreme Court's decision in *Belknap, Inc. v. Hale*,[16] and a copy of its ''freedom of choice'' proposal allowing nonstriking nurses to resign from the Union under the union-security provision of the collective-bargaining agreement.[17]

The Respondent and the Union met again on August 25, 1986. According to the Union's witnesses, at this meeting the Union requested that the return to work issue be set aside and discussion of other contract issues go forward. Heffernan testified that because it was the Union's position that it would reject any proposed contract package which did not include the return of the strikers to their prestrike jobs (amnesty demand), the Respondent rejected the Union's request

surgical-medical floors known as the Pomeroy wing (first Pomeroy 7, then surgical beds on other Pomeroy floors), then obstetrics/gynecology and pediatrics, with the operating room and critical care areas being expanded as more beds opened and patient census increased.

[9] The Respondent did not advertise at all for service and maintenance replacements although these employees were also still on strike at the time.

[10] Nursing employees who abandoned the strike and returned to work will subsequently be referred to as ''crossovers,'' and newly hired nursing employees and crossovers will be collectively referred to as ''nonstrikers'' or nonstriking employees. Shidlovsky testified that the majority of nurses working during the strike were crossovers and not newly hired nursing employees.

[11] The Respondent's witnesses identified these nursing employees as Sandy Stewart, Betty Karas, and Joan Brierly. Apparently none of these nurses were working on July 14, 1986. Stewart returned to work on July 28, 1986, and Karas and Brierly sometime in August 1986.

[12] Prior to the strike the Respondent utilized an ''Agreement of Appointment'' form for newly hired employees. In comparing the two forms I noted a substantial difference in the scope of the information sought and the underlying purpose for these documents. The ''Agreement of Appointment'' is a fairly comprehensive employment agreement listing the terms and conditions of employment while the ''individual contracts'' used during the strike merely sets forth the job the nursing employee was hired for with an assurance of continued employment after the strike ends, this latter purpose being the most obvious reason for the document.

[13] On August 11, 1986, the Respondent and NEHCEU negotiated a settlement of that strike regarding the service and maintenance employees.

[14] The Respondent had proposed a similar return to work provision on June 23, 1986, before it commenced advertising for replacements.

[15] This meant that hospital units would be reopened and striking nursing employees recalled only as needed and based on patient census.

[16] 463 U.S. 491 (1983). The Supreme Court held that permanent replacements for strikers could sue an employer for breach of contract and misrepresentation if they were terminated at the end of an economic strike. Heffernan testified that the *Belknap* decision was the basis for the Respondent's position that the ''individual contracts'' were legally binding on the Respondent as regards the nonstriking employees.

[17] Heffernan testified that he had been made aware of the *Belknap* decision before the Respondent began advertising for replacements on July 13, 1986, and before the drafting of the ''individual contracts.'' This would also have been prior to any nurses having expressed their ''concerns'' regarding the Union's July 14, 1986 newsletter.

and insisted that the parties resolve the return to work issues first. The Union also proposed that the bargaining agreement be modified to give probationary employees hired during the strike job-bidding and recall rights to ensure their ''continuous employment.'' The Respondent rejected this proposal on the basis that its commitment to nonstriking nursing employees was for specific positions and that these positions were therefore not available to returning strikers.

Also at the August 25, 1986 meeting the Respondent submitted a document to the Union entitled ''Return to Work Priorities As of August 25'' which it asserted was a plan for reopening the hospital rather than a proposal, and was not negotiable. Under this plan the Respondent would recall striking nursing employees to ''available'' positions in their prestrike hospital unit according to seniority, ''available'' positions being defined as those not committed to nonstriking employees.[18] The Union was told at this and prior meetings by the Respondent's legal counsel and spokesman, G. Bradford Palmer, that it was uncertain whether some of the strikers would ever be recalled to jobs because the Respondent did not know if its census would ever return to prestrike levels or how long it would take to reopen all hospital areas.

Barbara Larson, the Union's secretary-treasurer, testified that during the August meetings between the parties, the Union had requested information from the Respondent which it needed in order to be able to bargain with the Respondent concerning the return to work issue. Specifically, the Union requested copies of the ''individual contracts'' which the Respondent had signed with nonstriking nursing employees, and a list of the positions occupied by such employees, further identifying the crossovers who had taken positions different from those they held before the strike. On September 12, 1986, the Respondent gave the Union lists identifying those positions committed to new hires and to crossovers,[19] and during the last week of negotiations, September 29–October 3, 1986, furnished the Union with a copy of the ''individual contract'' form used during the strike to hire nonstriking employees.

Witnesses for the General Counsel testified that during the first 2 weeks in September 1986 the parties held several subcommittee meetings at Attorney Palmer's office to try to resolve the return to work issue, which had become the major obstacle to settlement of the strike. Representatives of both parties sought to find positions for both the striking and nonstriking nursing employees. It would appear that during these meetings the Union's representatives sought to have the striking employees returned to their prestrike positions while nursing employees hired during the strike would be moved into vacancies created by employee resignations occurring during the strike. However, Palmer insisted during these meetings that it was the striking nursing employees and not the newly hired and crossover employees who would have to make the accommodation to available jobs. Moreover, during late August and through September 1986, the Respondent had accelerated its efforts to reopen the hospital by recruiting nursing employees for all positions. However, it appears from the evidence that such recruitment and assignment of nonstriking employees continued notwithstanding that the assigned hospital unit was still actually closed or that the hospital area had a significantly reduced patient census at the time.[20]

Full negotiations between the Respondent and the Union resumed on September 17, 1986. The Respondent informed the Union that Pomeroy 5, Pomeroy 3 (pediatrics), postpartum (WW3), and the IV therapy departments of the hospital had not as yet reopened, and that some of the nonstriking nurses were not working in the positions for which they had been hired. They were ''rotating'' through the areas in which their jobs were located, but would be working in these jobs soon. The Union suggested that the Respondent cease hiring any new nursing employees since it already had trained, experienced employees on strike who could return to their jobs once the strike was settled. The Respondent rejected this suggestion.

Connecticut State Labor Commissioner, Joseph Peraro, entered the negotiations as mediator on September 29, 1986. During that final week of the strike Peraro shuttled between the parties respective caucus rooms with various proposals, information, and suggestions in a round of intense negotiations to facilitate an agreement and settle the strike. At the September 29, 1986 negotiations the Respondent agreed to a hiring moratorium, a freeze on the hiring of any new RNs or LPNs. Heffernan testified that at this time the Respondent employed 109 staff nurses at the hospital; 28 newly hired nurses, 62 crossovers who had returned to their prestrike positions, and 19 crossovers who had taken different jobs. At this meeting, the Respondent submitted to the Union a list of the outstanding issues to be resolved and a ''Return to Work Procedures and Timetables'' proposal. These latter procedures were applicable only to nursing employees remaining out on strike since the Respondent consistently maintained the position from August 13, 1986, on that the jobs committed to the nonstriking nurses would not be available to the striking nurses and LPNs at the conclusion of the strike.[21] The Respondent had also given the Union, at this meeting or shortly before, a document showing how the return to work would proceed. This document was also premised on the view that strikers would be returning only to

[18] As indicated by the record evidence, the Respondent's plan was to open Pomeroy 5, i.e., the surgical floor, the critical care units, the maternal/child unit which includes postpartum and pediatrics, and to offer ''full services'' in the emergency room, which according to the Respondent's proposal depended on availability of critical care beds. Next would be the expansion of hospital areas such as Pomeroy 7, the recovery room, one-day surgery, hemodialysis, and Nerriman II, i.e., the second floor in the psychiatry department, which at that time had been opened on a limited basis only. The Respondent maintained throughout the return to work discussions that the recall of strikers, ''is subject to change depending on patient census and work load requirements.''

[19] These lists identified positions as being committed to RNs and/or LPNs in areas such as Pomeroy 5, Pomeroy 3 (pediatrics), and postpartum (west wing 3 (WW3)), areas of the hospital which were not opened until after the strike ended. In addition, positions are identified as ''committed'' to RNs in areas such as the recovery room (RR), the emergency room (ER), hemodialysis, cardiology, and vascular which were opened on a limited basis and with a significantly reduced patient load.

[20] Denise Shanahan, a recovery room supervisor, testified that during the strike the Respondent employed seven nurses, including a head nurse, in the recovery area to handle a census of 3–4 cases per day, including four newly hired day-shift nurses alleged to be inexperienced, Maria Rogue, Carole Ademek, Cheryl Angel, and Theodora Hamilton. The prestrike census averaged 25–30 patients daily covered by a staff of 5 experienced nurses, including the head nurse. However, Ann Collins, a witness for the General Counsel testified that when she returned to work in the recovery room after the strike ended in October 1986, some of these newly hired nurses were in attendance at training classes and therefore not performing duties in this area.

[21] The ''Return to Work Procedures and Timetables'' proposal also provided that when a displaced striker's former position reopened, it would be offered to her before being put up for bid.

positions not yet committed to new hires or crossover nurses. The Union's position regarding the return of the striking nurses was also consistent in that it wanted all striking nursing employees returned to their prestrike positions and that new hires would bid on any remaining vacancies .

On September 30, 1986, the Respondent submitted to the Union an ''Alternate Job List'' proposal which Heffernan testified constituted an attempt by the Respondent to provide each displaced striker with an equivalent position to the job she/he held prior to the strike. Heffernan testified that the Respondent offered to create additional hours in the emergency room and one-day surgery units as a way of rehiring some of the displaced strikers to their former departments and shifts.[22]

On October 1, 1986, the Respondent proposed for the first time, through Peraro, the so-called 12-month rule. This rule provided for a 12-month period within which nonstriking nursing employees could not be replaced or ''bumped'' from their ''permanently committed'' positions.[23] Larson testified that on October 2, 1986, she and Dan Stewart, an International Union representative, representing the Union, and Palmer and Shidlovsky for the Respondent met to discuss the 12-month rule proposal. Larson told the Respondent that the 12-month no-bumping proposal was totally unacceptable. Larson stated that in or about this time, October 1 or 2, 1986, Peraro had told the Union's negotiators that he would withdraw from the negotiations if the parties had not reached an agreement by the end of that week. Larson related that in an attempt to work out a settlement, she offered a shorter period, from 1 day to 6 months, but Palmer advised the Union that the Respondent would insist on the 12-month period.[24] At the conclusion of the negotiations on October 2, 1986, with the parties having failed to reach agreement on settling the strike, Peraro suggested that each side prepare a final written proposal on all the unresolved issues for submission the following day.

The Respondent submitted a final proposal to the Union on October 3, 1986, containing a 12-month no-bumping provision as follows:

> A position will not be considered available where a permanent employment commitment to the position has been made by the Hospital to an individual prior to the date of ratification of the new nurses contract. Any such permanent employee shall not be subject to being bumped during the recall period of twelve (12) months from the ratification date; his/her own benefit, bidding, and bumping rights shall be determined by his/her regular seniority. For a period of ten days after the ratification date each individual in the bargaining unit who has returned to work prior to the ratification date, shall have the right to elect not to be required to join and/or thereafter to maintain membership in Unit #10 (CHCA) in good standing as a condition of continued employment with the Hospital under Article XXVIII. Any individual not so electing within the ten (10) days period shall be subject to all the provisions of Article XXVIII. Any such election shall be in writing with copies sent or delivered to the Union and the Hospital.

In addition, the Respondent's final proposal incorporated by reference the return to work procedure and timetables dated September 29, 1986, submitted to the Union earlier that week, and its return to work proposal dated August 15, 1986. Thus, the Respondent's final proposal also included the following provisions.

> C. Nothing in this agreement shall constitute a waiver of any legal rights which the Hospital or the Union may have, (1) to appeal any decision as to the payment of employment compensation benefits; (2) to pursue any claims regarding short term disability, worker's compensation, group insurance benefits or any notices or recoveries relating thereto; or (3) with regard to employees not represented by the Union.
>
> D. The Hospital and the Union agree, except as otherwise provided for in their Return to Work understandings that they shall not discriminate against or penalize any union employee[25] who participated or did not participate in the strike. The Hospital agrees that it will not discipline employees for activities taking place during the strike and prior to recall; provided, however, that it retains the right to discipline any such activity which is determined to constitute a felony under Federal/State Law. Nothing herein shall preclude either Party, or any individual from pursuing any other civil or criminal rights they may have.

The Union's return to work proposal submitted to the Respondent on October 3, 1986, provided, inter alia:

> 1. Strikers and working nurses shall be returned to their prestrike position, unit and shift.
>
> 2. No currently working employee shall experience an interruption of employment as a result of this settlement.
>
> 4. Hospital proposal re: Return to Work, ''II. End of 30 Days'' shall govern return to work procedures. ''Bumping'' is recognized as a last report and currently working employees shall be exempt from this for six (6) months.[26]

[22] Heffernan testified that 40 additional hours were added in the emergency room day shift and 80 additional hours in the one-day surgery department.

[23] The Respondent asserts in its brief:

> Respondent's Exhibit 10 created the possibility that nurses who had not been reinstated might have the opportunity to ''bump out'' permanent replacements even though no such rights existed under the normal seniority provisions of Article XVI of the Union Agreement. . . . The twelve month rule was discussed in the context of the negotiation of the return to work procedures. Its purpose was to assure that those nurses to whom permanent commitments of employment were made would not be subject to being replaced by virtue of the proposed Return to Work Procedures and Timetables, R. Exh. 10.

The Respondent continues in its brief that the 12-month period was chosen because, ''First it was expected that twelve months would be the maximum length of the recall period, and that all uncertainties would be resolved one way or the other by then. Secondly, the standard seniority recall period under both past and the new Collective Bargaining Agreement was Twelve months.''

[24] Larson testified that she had make this offer based on her belief that if Peraro pulled out of the negotiations, the Respondent would rescind its hiring freeze on strike replacements, and the strike might continue on thereafter indefinitely. The testimony of Shidlovsky, a witness for the Respondent, appears to corroborate Larson's version of what occurred at this meeting. Moreover, Shidlovsky acknowledged that the Union opposed the 12-month rule proposal throughout the remainder of the negotiations.

[25] In its final proposal the Respondent had changed the language ''any union employee'' to ''any employee in the bargaining unit.''

[26] This provision refers to the Respondent's return to work procedures and timetables dated September 29, 1986, which identified procedures under the

5. The return to work Settlement Agreement does not constitute a waiver of CHCA's right to seek judicial and administrative legal relief as may be available, specifically, Unfair Labor Practice charges currently filed related to individual employee contracts executed by the Hospital during the strike.[27]

The Respondent and the Union exchanged their final proposals during the morning of October 3, 1986. Later that day the parties full negotiating committees met, Palmer reviewed each of the Respondent's final proposals with a great deal of discussion arising with regard to the Respondent's return to work provision of the offer. According to the Union's witnesses, Larson and other members of the Union's committee questioned the 12-month no-bumping proposal and how it would work. Palmer explained that any nurse who worked during the strike could not be bumped from her job no matter what during the 12-month period. This included layoff situations and the closing or reallocation of a hospital departmental unit.[28] Thus, an RN or LPN with greater seniority who worked in a closed or reallocated unit could not exercise contractual bumping rights under article XVI(a) of the bargaining agreement to replace a less senior nurse who had worked during the strike.[29] The Union's committee representatives, including Larson, raised objections to this provision as creating superseniority status for the nonstriking nursing employees.

After the Respondent's proposals had been modified with Peraro's assistance, the parties met again during the evening of October 3, 1986, and discussed the proposals submitted. Larson testified that during the discussions and on the issue of the return to work proposal, the Union had maintained its position that the 12-month rule provision was illegal, that the individual contracts of employment between the Respondent and the nonstriking employees were also illegal, and that the Union would continue to pursue the unfair labor practice charges it had filed with the Board previously. Larson stated that Palmer told the Union that the language he had included in the Respondent's proposals preserved the rights of both parties regarding any outstanding legal issues and the pursuit thereof. The employee-members of the Union's negotiating committee called as witnesses testified, in substance, that during their final meeting with the Respondent, the Union vehemently opposed the 12-month proposal, told the Respondent's representatives that it would not accept this proposal, and that in accepting the Respondent's final offer, as modified, the Union was not waiving its right to maintain the charges it had filed with the Board.

The testimony of the Respondent's witnesses, Heffernan and Shidlovsky, differs in some aspects to that given by the Union's witnesses. Shidlovsky testified that she did not recall any discussion of the 12-month no-bumping provision at the final meeting between the parties. However, Shidlovsky also acknowledged that she had no clear memory of that meeting. Shidlovsky did recall that the Union had objected to any preference for nonstriking nurses throughout the negotiations and that there had been some discussion regarding whether the pending ''unfair labor practice claims'' would be withdrawn. Heffernan at first could not recall any discussion of the 12-month no-bumping rule with the Union's representatives on October 3, 1986. After Heffernan was referred to his notes taken during the negotiation sessions which reflected that a discussion of the no-bumping provision had been engaged in, he recalled that the Union did tell the Respondent on October 3, 1986, that it would not accept the Respondent's 12-month rule. Heffernan also testified that at this meeting, the Union objected to the Respondent's use of the ''individual contracts'' with nonstriking nursing employees and indicated that it would pursue the unfair labor practice charge filed with the Board regarding this issue.[30] However, Heffernan also testified that the Union indicated that it was going to pursue the unfair labor practice charges filed relating only to the ''individual contracts.''[31]

On October 4, 1986, the Union presented the final proposal to its membership for consideration noting that it was not accepting the 12-month no-bumping proposal and was pursuing unfair labor practice charges regarding the ''individual contracts'' with the nonstrikers. The union members ratified the proposed contract and the Union notified the Respondent that the striking employees would be returning to work. Heffernan testified that as of that date there were 109 nurses working at the hospital.

Larson testified that she and Heffernan continued to meet to discuss the return to work proposal even though some

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contract, such as the voluntary reduction in hours, shift cancellations, sharing hours, etc., which could be used to return to work the striking nurses.

[27] The ''individual employee contracts'' in this proposal refers to the ''individual contracts'' which the Respondent used to employ nonstriking employees during the strike.

[28] However, in its brief the Respondent asserts that the ''twelve month rule'' had a ''limited effect,'' and that the Union recognized this as evidenced in a letter from Larson to Hefferman dated November 18, 1986. It should be noted that Larson's letter does acknowledge the Union's belief as to such ''limited effect,'' but alleges that the Respondent was not applying the rule as limited in some instances. The Respondent acknowledges in its brief that:

> 95. Specifically, the twelve month rule provided only limited protection to new hires and crossovers against the possibility of being bumped during the recall period by operation of the recall provisions. The new hires and crossovers were subject to all other fluctuating economic conditions and contractual provisions as the strikers were, including those governing floating, reallocation of the unit, temporary layoff, permanent layoff (the nurse could not be ''bumped'' for 12 months but she could bump another nurse if she were laid off for any reason), rotation, voluntary and permanent reduction of hours, hours of work and conditions of employment, temporary reassignments, and shift cancellations.
>
> 96. Furthermore, CHCA understood that the twelve month rule ceased, inter alia, upon a job bid or upon any permanent change in the position occupied at the time of ratification.

I am not sure that this was the Union's understanding of this provision.

[29] In an affidavit dated November 14, 1986, given to a Board agent during the investigative stage of these proceedings, Heffernan had indicated that this was the way the 12-month no-bumping provision would work. Hefferman testified that the purpose of this proposal was to ensure that a permanent replacement would not be rendered temporary by activation of the procedures specified in the Respondent's September 29, 1986 proposal (return to work procedures and timetables) which were to occur after 30 days. However, witnesses who testified as to what occurred at the September 29, 1986 negotiations, recalled that the Respondent had clearly indicated, when it proposed these procedures such as bumping, that they would not be applicable to the permanent replacements.

[30] One of the unfair labor practice charges pending at the time, Case 39–CA–3200, included allegations concerning these ''individual contracts,'' and subsequent to the negotiations' conclusion, the Union amended the charge to allege that the assignment of specific jobs to nonstriking nurses through these individual contracts violated Sec. 8(a)(1), (3), and (5) of the Act.

[31] The Union's final settlement proposals on October 3, 1986, contains the following:

> The return to work Settlement Agreement does not constitute a waiver of CHCA's right to seek judicial and administrative legal relief as may be available, specifically, Unfair Labor Practice charges filed related to individual employee contracts executed by the Hospital during the strike.

striking employees had already returned to work after the strike had ended.[32] Additionally, the Union commenced arbitration proceedings against the Respondent alleging violation of the terms of the return to work and recall agreement between the parties. In January 1988, Heffernan sent the Union a ''final return to work agreement.'' Larson related that she called Heffernan and told him that she was still concerned about the agreement and wanted to consult the Union's attorney about its provisions. Heffernan asked if she was referring to the unfair labor practices and Larson answered, ''yes.'' After discussion with the Union's legal counsel, Larson made changes reflecting the Union's position as taken at the final meeting on October 3, 1986, that the Union was not waiving its rights to challenge the 12-month no-bumping provision and the ''individual contracts'' with the nonstriking nursing employees. Larson then signed the agreement and returned it to Heffernan.

### B. *Striker Replacement and Recall*

The record evidence shows that various areas of the hospital such as Pomeroy 5, Pomeroy 3 (pediatrics), postpartum (WW3), Merriman 2 (psychiatry), and the IV therapy department, were not opened until after October 4, 1986, when the strike ended. Other areas of the hospital such as hemodialysis, the emergency room and the recovery room, which were opened during the strike on a limited basis, continued serving a reduced patient census, when the striking nursing employees began to return to work on October 5, 1986.

#### 1. Hemodialysis

In May 1986 the census of the hemodialysis unit was 42 basic patients. At that time all the staff in hemodialysis were on rotating day shifts[33] except for two nurses, Jackie Ashwood and Elizabeth Kaminski, who worked the evening shift. The nurses on the day shifts were Head Nurse Josephine Morton, Irene Marone, Nancy Banno, Elaine Purcaro, Patricia DeVito, Jane Ann Cross, and Mary Ellen Griffin. Additionally, Helen Brickel, an experienced hemodialysis nurse, had bid into the unit from another hospital department prior to the strike and was scheduled to begin working in hemodialysis on June 2, 1986. After the strike began on June 4, 1986, and the hospital closed down, it was not until July 2, 1986, that the hemodialysis unit reopened on a limited basis. Head Nurse Morton and four staff nurses, Marone, Ashwood, Banno, and Purcaro, crossed the picket line and returned to work. In mid-July 1986 Brickel also joined the hemodialysis unit. Also working in hemodialysis were two nursing supervisors, Joanne Valente and Celeste Williams, who had dialysis experience and worked full time in the hemodialysis unit during the strike. Morton testified that when the hemodialysis unit first reopened the patient census was 6 and increased to 12–15 by the end of July 1986. Thus, a total of 8 nurses were covering a patient load of from 6–15 patients during that month. Prior to the strike, 10 nurses serviced an average daily census of 42 patients, including severe acuity cases, which were not treated at the hospital during the strike.[34]

Effective September 21, 1986, although she did not actually begin working there until approximately September 29, 1986, toward the end of the negotiations the Respondent transferred nurse Rosemary Mancini, who had been employed full time on the night shift in Pomeroy 6 during the strike, to a 32-hour part-time day position in the hemodialysis unit.[35] Mancini had no prior dialysis experience, although Morton testified that she was fully qualified for the hemodialysis position. At the time of Mancini's transfer, the hemodialysis unit had 22 patients and was staffed by 6 experienced nurses and 2 supervisors. By the end of the strike there were still 26 patients being cared for in this hospital unit. Moreover, because of the reduced patient census during the strike the hemodialysis unit operated on a 12-hour, 3-day-per-week schedule and an 8-hour evening shift. Morton testified that the nurse staffing during the strike was sufficient to handle the reduced poststrike patient census, which was about 50 percent of what it had been prior to the strike. Morton added that at no time after the strike did the hemodialysis unit reach its prestrike patient census.

Both Morton, a witness for the Respondent, and Patricia DeVito, a witness for the General Counsel, testified that nurses who were hired for the hemodialysis unit were given at least 3 to 6 months of specialized training in the work of that unit as the abilities of the nurse required. Morton maintained that following her transfer into hemodialysis, Mancini was in ''orientation'' or training status. DeVito, a nurse with 16 years of dialysis experience, testified that after the strike ended, Morton told her that the patient census was not high enough to allow her reinstatement to her job but that she would be returned to work when her ''turn came up.'' DeVito was reinstated in late November 1986, after a grievance was filed and a meeting held between the Union and Norma Shidlovsky.[36]

The evidence shows that other striking nurses were not fully reinstated to their prestrike shifts in hemodialysis because of a preference in scheduling hours for nonstriking nurses. For example, Jane Ann Cross, who was reinstated on October 10, 1986, to a different shift than she had worked prior to the strike, was told by Morton that nonstriking

[32] In mid-October 1986 soon after the contract had been ratified a summary of the agreement was distributed to union members at a union meeting. The summary states, inter alia, that:

> A permanent replacement nurse given an ''employment contract'' during the strike can not be bumped for a period of 12 mo. after ratification, subject to decision of NLRB. All other provisions of article 16 seniority apply.

Moreover, a summary of the return to work procedures also given to union members at the same time contains at its conclusion, in caps:

> The Union has not waived its right to pursue pending unfair labor practices on individual contracts to permanent replacements and any other legal actions that remain unresolved.

[33] 6 a.m. to 2:30 p.m. and 9:30 a.m. to 6 p.m.

[34] Morton testified that the normal ratio of nurses to patients should be one staff nurse to three stable patients. The Respondent advertised for permanent replacements for the striking hemodialysis nurses during the summer of 1986.

[35] The parties stipulated that no ''individual contract'' of employment had been executed between the Respondent and Mancini when the transfer to hemodialysis took place.

[36] Shidlovsky testified that she decided at this time to reinstate all the hemodialysis nurses who had gone out on strike and who had not as yet returned to work, so as not to lose their skills for the hospital. Interestingly, Morton testified, in effect, that she would not have called back DeVito or two other hemodialysis nurses after the strike ended, Elizabeth Kaminski and Mary Ellen Griffin, because the patient census in hemodialysis was not sufficient to warrant their recall based on the number of nurses working in that unit. However, Mancini had been hired toward the end of the strike despite a somewhat lower patient census but admittedly with an adequate number of nurses already on hand and working.

nurses were guaranteed their hours first. Cross testified that she was required to fill in her hours with vacation days in order to ''get my forty hours.'' Mary Ellen Griffin, who prior to the strike held a full-time position in hemodialysis, was reinstated approximately 1 month after the strike ended, to a part-time position (16 hours). Griffin testified that Morton had told her that this was because the patient census was down and the nonstriking nurses would receive their work hours first.[37] Morton did not specifically deny making such statements and admitted that after the strike, her priority was to give the worktime to the nurses who worked during the strike, and then to the reinstated strikers by seniority, based on census need and requirements.[38] Morton related that prior to the strike, if the census declined, the Respondent would not reduce the hours of work of the nurses in the unit but would use the extra time for additional educational program opportunities for these nurses. Morton also testified that with the exception of Kaminski who took maternity leave in January 1987, and who subsequently returned as a per diem nurse, all the striking hemodialysis nurses have returned to their prestrike hours.

2. The emergency room

The evidence shows that prior to the strike the emergency room treated 130–135 patients on an average day, including 20–25 patients in its walk-in clinic. In June 1986 and after the hospital had closed, the walk-in-clinic portion of the emergency room was reopened on evenings and weekends.[39] By the end of the strike, the clinic was open 24 hours, but not accepting trauma cases normally treated in the emergency room. The Respondent's witnesses testified that full emergency room services were not offered during the strike because of the lack of critical care beds, this being attributed to the shortage of staff nurses in those units to cover the evening and night shifts. The total nursing staff in the emergency room, prior to the strike was five RNs per shift on the day and evening shifts and two RNs on the night shift.[40]

During the strike, the Respondent awarded full-time day-shift positions in the emergency room to four RNs, replacing four striking nurses. Sandra Stewart, a crossover who previously worked evenings in the emergency room, was awarded a day-shift position on July 28, 1986. Crossover Mary Ann Kaminski, who previously worked as a float nurse on the evening shift, signed for a day-shift position on July 31, 1986. Betty Karas, another crossover who previously worked in the IV therapy department, was awarded a day-shift position in the emergency room on August 10, 1986. Claudia Curtis, who did not sign her individual contract and who had been hired during the strike to work in the intensive care unit, was given a day-shift position in the emergency room on September 22, 1986. None of these four nurses started working these day-shift positions on a permanent basis until after the strike had ended. The Respondent's timesheets for the period of the strike show that Stewart continued to work her prestrike evening shift from the time she returned to work during the strike on July 28, 1986, until October 8, 1986, the date striking nurses were first recalled to positions in the emergency room.[41] Additionally, the timesheets show that Stewart usually worked elsewhere, such as Pomeroy 7 and the intensive care unit (ICU), during the strike, even though carried on the emergency room records.[42]

Karas signed an ''individual contract with the Respondent on August 10, 1986. Her name does not appear on the emergency room timesheets until September 7, 1986, and from that date until October 8, 1986, after the strike ended, Karas worked the evening shift only.[43] Prior to September 29, 1986, when Kaminski's name appears on the emergency room timesheets, she worked the evening shift on Pomeroy 7, the only medical/surgical floor open during the strike.[44] Moreover, the emergency room timesheet for the week of September 29, 1986, indicates that Kaminski was undergoing orientation training while working on the day shift that week. This timesheet also shows that at least one and sometimes two experienced nurses, including the head nurse, Gladys Benson, worked with Kaminski in the emergency room that week.[45] Curtis was hired by the Respondent during the strike to work in the critical care unit and with the exception of 3 days, September 24, 25, and 26, 1986, when she was in the emergency room on day-shift ''orientation,'' she worked in the critical care unit during the strike.[46] As testified to by the Respondent's witnesses, the critical care unit was one of the areas that the Respondent had difficulty in opening during the strike because of a lack of nurses.

The four striking nurses who were displaced by the awarding of day-shift positions in the emergency room unit to the above nonstriking nurses were, Cathy Neri, Kathy Meehan, Pat Krok, and Marge Anderson, all of whom had worked in

[37] Both Cross and Morton had more seniority than the other nonstrikers in hemodialysis.

[38] As set forth above, the General Counsel moved at the hearing to amend the complaint to allege that the Respondent had violated Section 8(a)(1) and (3) of the Act by discriminatorily awarding preference in scheduling hours of work and shifts to nonstriking employees in the hemodialysis unit. I denied this motion. The General Counsel renewed the motion in the brief and in the alternative alleges that, ''[A] finding of a violation based on this conduct, even absent amendment of the complaint, is warranted, inasmuch as the issue was fully litigated at the hearing.'' I agree that the issue was fully litigated at the hearing through evidence submitted by all the parties, and I will therefore consider whether the Respondent's acts in this connection constituted a violation of the Act in the ''Analysis and Conclusions'' portion of this decision. *A–1 Schmidlen Plumbing Co.*, 284 NLRB 1506 (1987).

[39] The walk-in clinic treats patients with minor injuries, sprains, colds, stomach ailments, and other non-life-threatening conditions. The normal staffing for the walk-in clinic prior to the strike was one RN and a physician.

[40] The emergency room records for the period August 31–October 4, 1986, the period during the strike when the emergency room was open 24 hours daily, shows that an average of 27 patients were treated during the 24 daily hours.

[41] Stewart is listed as having worked on the day shift on September 15 and 16, 1986, but on those days she actually appeared at a court injunction hearing regarding the Union's picketing activities.

[42] During the first 4 weeks of her return to work, Stewart worked only one evening a week in the emergency room. Thereafter, Stewart spent approximately one evening each week, until the end of the strike, working on either Pomeroy 7 or in one of the ICUs.

[43] Karas is listed on the day shift for September 15 and 16, those dates being the days she appeared as a witness for the Respondent in the aforementioned injunction proceeding.

[44] Kaminski also appeared at the injunction hearing on September 15 and 16, 1986. The Pomeroy 7 timesheets for the week of September 14, 1986, indicate that these dates were the only days on which Kaminski is listed as having worked on the day shift before September 29, 1986.

[45] According to the testimony of nurses who had worked in the emergency room, a new nurse would require a 2-week orientation, followed by on-site training with an experienced nurse in addition to these classes before she could work alone in the emergency room. Thus Kaminski was attending classes to qualify as an emergency room nurse even after the striking nurses returned to work.

[46] Although Curtis' ''individual contract,'' which is unsigned, indicates a September 22, 1986 effective date for her transfer into the emergency room, her personnel change record shows a September 28, 1986 effective date.

this unit prior to the strike as day-shift staff nurses. Neri, Meehan, and Krok were offered full-time positions in the emergency room unit on the evening shift. Anderson was finally given a full-time day-shift position in the emergency room when such an additional position was created by the Respondent in an attempt to resolve the return to work issue.[47]

Additionally, Leslie Swiderski, a striking staff nurse in the emergency room working part time every other weekend on the day shift prior to the strike, was not reinstated after the strike. Swiderski testified that the alternate weekends she scheduled for work were arranged so that she and her husband could cover their child care needs. During the strike Swiderski was a member of the Union's negotiating committee and arranged a well publicized meeting between the striking nurses and the doctors who use the hospital facilities, including also the Respondent's chief of staff, Dr. Amatruda. She related that despite her offer to work nights and evenings after the strike ended, she was told that her services were not needed because her former position had been taken by a nonstriking crossover nurse, Elizabeth Bacchiochi, who had previously worked evenings at the hospital.[48] Swiderski declined the offer of different weekend hours because of her child care scheduling problem. Swiderski returned to her prestrike alternate weekend work schedule in the emergency room when Mary Ann Kaminski, a nonstriking replacement nurse agreed to relinquish these weekend hours to Swiderski, in early December 1986.

In addition to the above striking staff nurses in the emergency room displaced from their day-shift positions by replacement nurses, Dorothy Weigold, the assistant head nurse of this unit was also not reinstated to her former position after the strike ended.[49] On August 10, 1986, Respondent signed an ''individual contract'' with Donita Semple as the assistant head nurse in the emergency room unit, Semple having previously worked as a staff nurse on the day shift in the emergency room. The evidence shows that on her return to work during the strike, Semple worked on the evening shift, mostly in Pomeroy 7. On Semple's appointment to assistant head nurse in the emergency room she was working the day shift on Pomeroy 7. Between the weeks of August 17 through August 30, 1986, Semple worked in the emergency room on the day shift for 4 or 5 days, but during this time she was not identified as the ''Assistant Head Nurse'' on the timesheets. From August 29, 1986, until October 10, 1986, Semple worked exclusively on the night shift in the emergency room.[50] After October 10, 1986, Semple worked as the assistant head nurse in the emergency room.

At the end of the strike not having reinstated Weigold to her prestrike position as assistant head nurse in the emergency room the Respondent offered Weigold the assistant head nurse's position in the coronary care unit. Weigold declined this job offer because, as testified to by her, she lacked the experience in this department necessary to perform the duties of assistant head nurse/coronary care unit and because of the differences in the nature of the work between the emergency room and coronary care units. However, the Respondent's witness, Shidlovsky, testified that Weigold with some orientation would be qualified for the coronary care position.[51]

### 3. Recovery room

According to the testimony of the Respondent's witness, Janet Shaken, the clinical supervisor of the recovery and the operating rooms, the recovery room is the area of the hospital where patients who received operative procedures are kept after the operation and before their return to their rooms. Prior to the strike, the recovery room shared space with the one-day surgery unit which handled patients whose surgery procedures did not require in-house preparation, recovery, and stay. One head nurse, Betty Ciriello, covered both these units and one-day surgery had its own staff of eight part-time staff nurses. The recovery room was staffed by four full-time nurses, Ann Collins, Pat Angel, Shirley Shannon, and Donna DaPonte, and on alternating days, part-time staff nurses Anita Baldino and Carolyn Povilaitis during the day-shift hours.[52] While the Respondent had decided to separate these two units with a head nurse for each, Ciriello for one-day surgery and Virginia Napolitano for the recovery room, during the strike the staff of the two units worked together and were listed on the same timesheet.

The recovery room reopened during the strike in mid-June 1986 to handle one-day surgery patients and started caring for in-house surgical patients in July 1986. Shahen testified that the recovery room processed 47 non-one-day surgery patients in July, 98 in August, and 120 in September 1986, an average of 4 recovery patients per day. Prior to the strike, the patient census in the recovery room, exclusive of one-day surgery patients, was 25 per day.[53]

During the strike one of the full-time day-shift nurses, Donna DaPonte, crossed the picket line and returned to her prestrike position in the recovery room. Also during the strike, the Respondent hired replacements for the other striking recovery room nurses, Barbara Lobdell, Carol Adamak, and Maria Rongue for the full-time day-shift positions and Cheryl Angel and Theodora Hamilton for the part-time alternate day shifts. Shahen testified that by the end of the strike and because of the low patient census then existing in the

[47] Anderson is listed as one of the four striking nurses replaced by a nonstriker in the emergency room, in the General Counsel's brief. Anderson is also listed as a striking RN who was returned to a full-time evening-shift position in the emergency room (R. Exh. 4).

[48] Bacchiochi signed an ''individual contract'' for the alternating weekend day-shift position on July 26, 1986. She did not begin working a day-shift weekend position until the weekend of September 13 and 14, 1986. Actually the record evidence indicates that Kaminski and a new hire, Imad Hamzi, who had not signed an ''individual contract'' with the Respondent, covered the alternate weekend hours that would have constituted Swiderski's shift had she been reinstated after the strike ended. Moreover, it was with Kaminski, not Bacchiochi, whose switch of hours on the weekend day shift allowed Swiderski to return to her prestrike position. Additionally when Swiderski returned to working the weekends that her husband did not, she worked the opposite weekend from Bacchiochi instead of the same weekend as Bacchiochi.

[49] Weigold testified that she had been assistant head nurse in the emergency room, for 4-1/2 years before the strike with a total of 21 years' emergency room experience overall. According to Weigold, the assistant head nurse works on the day shift, filling in for the head nurse in her absence and does not rotate to other shifts.

[50] Although the timesheet for the week after the strike has Semple listed as the ''AHN'' for the first time, this timesheet is a revised one. The original timesheet for that week has Semple listed as a staff nurse on the night shift.

[51] Required would be a 4–6 week coronary care course and some additional assistance to adapt to working as the assistant head nurse in that unit.

[52] Shahen also listed the following nurses as part-time staff nurses in the recovery room: Mary Jo Skiba, Donna Tragillia, Nancy Nisenti, Diane Martin, Debbie Corangelo, Mary Campion, and Carolyn Povilaitis.

[53] Shahen testified that staffing in the recovery room is based on patient census with a desired patient/nurse ratio of 3 to 1.

recovery room, the Respondent had adequate staffing in this unit.

Lobdell had been working as head nurse in the surgical intensive care unit prior to her acceptance of a full-time day-shift position in the recovery room. Adamak was an evening-shift float nurse on the medical/surgical floors before and during the strike before coming to the recovery room. She signed an ''individual contract'' with the Respondent regarding the recovery room on July 30, 1986, but does not appear on the recovery room timesheets unit September 8, 1986. Rogue, who bad worked the day shift on Pomeroy 5 (one of the medical/surgical floors) and Pomeroy 7 both prior to and during the strike, respectively, signed an ''individual contract'' for the recovery room on August 14, 1986, and appears on the recovery room timesheets on August 18, 1986, on ''orientation.'' Angel and Hamilton, private duty nurses before the strike, signed ''individual contracts'' with the Respondent for the two part-time positions in the recovery room on September 8 and 26, 1986, respectively.

According to the testimony of the various witnesses, a nurse must have a coronary care course and orientation training in the recovery room before being able to function adequately as a staff nurse in that unit. It takes 6 to 8 weeks of training in the recovery room and months overall for a new or inexperienced nurse to become a recovery room nurse. Baldino, a striking nurse who was not reinstated to her previous recovery room position testified that after her return to work at the hospital in November 1986, wherein she was given a position in the one-day surgery unit, she often was required to assist the inexperienced nurses who had been hired during the strike as recovery room replacements.

### 4. Inpatient psychiatry department

Prior to the strike, the Respondent's inpatient psychiatry unit consisted of two 24-bed floors known as Merriman 2 and Merriman 3, each floor with its own staff and head nurse. At that time Paula Stec and Thelma Cofrancesco were assistant head nurses on Merriman 3 and Merriman 2, respectively. During the strike, the Respondent reopened Merriman 3. Stec joined the striking nurses while Cofrancesco crossed the picket line to return to work. On July 23, 1986, Cofrancesco signed an ''individual contract'' with the Respondent with an effective date of June 2, 1986, for the assistant head nurse position in Merriman 3, the floor that was open.[54] According to the Respondent's brief, ''Then in an attempt to staff Merriman-2 in order to open it, the assistant head nurse position for Merriman-2 was offered to and accepted by Nerida Cruz in September of 1986.''[55] The Respondent's witness, Doreen Elnitsky, the psychiatry department nursing supervisor, testified that Merriman 2 opened on December 6, 1986, approximately 2 months after the strike ended. At the conclusion of the strike Stec was not reinstated to her prestrike position.

Additionally, Grace Labriola, who was employed prestrike as a part-time nurse on Merriman 3 was not recalled to this position until December 1986, although she had been given some per diem work in November 1986. The record evidence shows that nonstriking nurses who signed ''individual contracts'' for part-time day-shift or evening-shift positions were working hours in and above the usual part-time hours they would normally work. For example: Sandra Santasiero, a part-time day-shift nurse worked 40 hours during the week of October 12, 1986, though her normal work week was 24 hours; Frances Liquinoli, a part-time evening-shift nurse, worked on the day shift twice during the week of October 12 and once each in the weeks of October 19 and 26, 1986, in addition to her regular evening-shift hours; and Nancy Saluzzo, a part-time day-shift nurse, stopped work on leave of absence after October 18, 1986. Labriola was not offered any of these extra work hours.

### 5. The vascular lab

The vascular laboratory is part of the clinical services department and performs noninvasive testing for occlusive blood disease. A substantial amount of training is required for any nurse assigned to this area, including attendance at classes given outside the hospital to learn the operation of the highly technical equipment/machines used in the testing. Prior to the strike the vascular lab was staffed by one full-time nurse, Angela Gee and a part-time nurse (20 hours) Robin Baldwin.[56] Both Gee and Baldwin joined the strike and remained out until the strike ended and neither was reinstated to their former prestrike positions.

At the beginning of July 1986 during the strike, the vascular lab reopened with Barrere performing the arterial and venous studies previously done by Gee and Baldwin.[57] Only five tests were done weekly compared to the prestrike testing of from four to six patients daily. Effective August 18, 1986, the Respondent hired Linda Sugrue to the full-time nursing position in the vascular lab.[58] According to the Respondent's records, Sugrue did not physically start working for the Respondent until the week ending August 30, 1986. Sugrue underwent orientation and training throughout the remainder of the strike. The Respondent's records also show that a total of eight arterial and venous studies were done in the vascular lab from the time Sugrue was hired until the strike ended. Sugrue also attended a seminar during the week ending September 20, 1986.

At the conclusion of the strike the Respondent offered Angela Gee a full-time position at the same pay and on a similar shift to the one she previously had in the vascular lab, on a medical/surgical floor which Gee accepted. When

[54] The seniority lists for the assistant head nurse position, in evidence, show that Cofrancesco was still identified as the assistant head nurse for Merriman 2, the floor not yet opened, in October, November, and December 1986. These records also indicate that Stec is senior to Cofrancesco.

[55] Actually, Cruz signed an ''individual contract'' with the Respondent on September 22, 1986, for the assistant head nurse's position in ''Psychiatry inpatient unit'' effective August 25, 1986. However, the Respondent's personnel change record for Cruz indicates that she was hired for the assistant head nurse's position in Merriman 3, the unit that was open during the strike. Additionally, the timesheets used in the psychiatry department during the strike identify neither Cofrancesco nor Cruz, as the assistant head nurse.

[56] While Cindy Barrere, supervisor of the vascular lab, testified that Gee and Baldwin each worked 20 hours in the vascular lab, with Gee working an additional 20 hours in the medical outpatient area of the hospital and that between them Gee and Baldwin constituted the vascular lab's ''full-time equivalent,'' she also testified that prior to the strike she had trouble justifying 60 hours of nursing work in the vascular lab, which would indicate one full-time and one part-time position, because of insufficient volume of testing work required.

[57] Barrere was not trained to perform carotid studies using the machines involved in the procedure and did not perform such work as had Gee.

[58] The ''individual contract'' between Sugrue and the Respondent is dated July 29, 1986.

Sugrue resigned in December 1986, the Respondent offered Gee her former job back, which she accepted.

6. Cardiology

The cardiology department is composed of various laboratories and units including: the cardiac catheterization laboratory (referred to as the cath lab), the stress and thalium testing laboratory, the cardiac rehabilitation exercise laboratory (referred to as rehab), the pacemaker clinic, and halter monitoring (transmissions from a patient's home to the hospital for monitoring of the patient's condition). Roseanne Skrip, the cardiology manager, supervises this department. Prior to the strike, the cardiology department was staffed by four part-time nurses and one per diem nurse, Dawn Smith, who filled in as needed in all units except the pacemaker clinic. Adrienne Caverley worked 32 hours weekly in all areas of cardiology; Carolyn Poulin held a 24-hour position and worked in the cardiac cath lab, the pacemaker clinic, and the stress and thalium testing lab; Gerry True worked 20 hours on the evening shift in the cardiac rehabilitation lab; and Donna Seraphin worked 20 hours on the day shift in rehab. Seraphin's position had been awarded to Monica Giacomi effective in early June 1986 due to Seraphin's projected maternity leave.

During the strike, the cath lab and rehab remained closed, but the other areas were open. In addition, EKGs normally done by EKG technicians who were on strike were now done in cardiology by cardiology nurses.[59] The positions held by striking nurses, Caverly, Poulin, True, and Giacomi were awarded to new hires Patty Lacoviello and Dawn Smith, and crossover Eileen Bartolini. These nonstriking nurses received full-time 40-hour positions in cardiology.

7. IV therapy department

The IV therapy department nurses perform work in regard to starting IVs, blood transfusions, and arterial blood gases throughout the hospital. The IV therapy department was closed during the strike and crossover nurses who had worked there prior to the strike were assigned to other units in the hospital during the strike. The evidence shows that these IV nurses performed some IV therapy work during the time they worked in these other units, functioned as staff nurses there, and were listed on the timesheets of the unit for which they worked. The Respondent asserts that was necessary ''Because of the strike conditions and the need . . . to shift nurses around in order to meet its unpredictable staffing needs.''

Prior to the strike, the IV therapy department consisted of a head nurse, Elise Jones, and four staff nurses, Lori Neave, Betty Rill, Betty Karas, and Barbara Keane. Keane was the only nurse of the four that did not cross the picket line and return to work during the strike.[60] There were also five part-time nurses, including Joan Brierly who worked the evening shift. Brierly, a crossover, returned to work on or about August 12, 1986. The Respondent awarded her a full-time day position in IV therapy that day. However, Brierly did not begin working in IV therapy until October 13, 1986, and after the strike had ended. From the date she returned to work until the strike ended Brierly appears on the Pomeroy 7 timesheets for the evening shift except for two day-shifts in one-day surgery.

8. Medical-surgical floors

The only medical-surgical floor open during the strike was Pomeroy 7, a surgical teaching floor. On July 23, 1986, the Respondent promoted Ralph Proulx who had crossed the picket line, from a staff nurse to the assistant head nurse on Pomeroy 5. However, since Pomery 5 was closed, Proulx performed the duties of AHN on Pomeroy 7. When Pomeroy 5 opened, Proulx assumed the AHN position in that unit. Striker Kay Walling was not returned to this position, which she had held prior to the strike, after the strike ended.

Also, on July 22, 1986, Phyllis Barth, a crossover LPN was transferred from a full-time day position to a part-time 32-hour evening position in pediatrics (Pomeroy 3). Barth did not commence working in pediatrics until after the strike ended and Pomeroy 3 reopened. Since July 22, she had been working on Pomeroy 7. Marion Waller, who remained out on strike until the conclusion thereof, had held the position prior to the strike.

9. West wing 3

The Respondent awarded a full-time night position in west wing 3, the postpartum unit in obstetrics-gynecology to crossover LPN Elizabeth Shypinka on August 31, 1986, although this unit did not reopen until October 8, 1986, after the strike ended. Prior to October 8, 1986 when Shypinka started working in west wing 3, she worked nights on Pomeroy 207. Striker, Carolyn Fagnand, had held this position in west wing 3 prior to the strike.

C. *Analysis and Conclusions*

1. Deferral to arbitration

The Respondent seeks deferral to arbitration of the issues in this case stating in its brief that:

> It is clear that the issues regarding whether strikers were returned in the proper order and whether some are entitled to backpay are within the scope of the arbitration pending between the parties and should be deferred in accordance with the Board's *Collyer* [192 NLRB 837 (1971)] policy.

Initially, whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered.[61] In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board established the following criteria for prearbitral deferral: Where the dispute arose ''within the confines of a long and productive collective bargaining relationship''; where there is no claim of ''enmity by Respondent to employee's exercise of protected rights''; Where ''Respondent has . . . credibly asserted its willingness to resort to arbitration under a clause providing for arbitration in a very broad range of disputes and unquestionably broad enough to embrace 'the dispute before the Board'''; where the contract and its mean-

[59] Skrip acknowledged that EKGs constituted a substantial amount of the work performed in cardiology during the strike.

[60] Keane was a member of the Union's negotiating committee.

[61] *L. E. Myers Co.*, 270 NLRB 1010 fn. 2 (1984). Also see *E. I. du Pont & Co.*, 293 NLRB 896 (1989), and cases cited in fn. 2.

ing ''lie at the center of this dispute''; and where the dispute is eminently well suited to resolution by arbitration.[62]

Thereafter in *United Technologies Corp.*, 268 NLRB 557 (1984), the Board in affirming the deferral policy in *Collyer*[63] stated that it would defer to arbitration those complaints alleging violations of Section 8(a)(1), (3), or (5) of the Act when the underlying issues are cognizable under the grievance-arbitration provisions of the parties' collective-bargaining agreement. However, when an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied.[64] Moreover, the Board will defer unfair labor practice allegations to the arbitral process as long as it is reasonable to anticipate that resolution of the contract dispute would also resolve the unfair labor practice dispute.[65]

The General Counsel acknowledges that there is ''some similarity'' between the grievances filed by the Union and the allegations in the complaint in that:

> [I]t appears the issues raised by the grievances involved whether Respondent breached the return to work agreements by not offering available hours to nurses awaiting reinstatement; by utilizing floats, rotations, per diam nurses and overtime before offering positions to unreinstated strikers; and by not offering available alternative positions to nurses who had been displaced from their regular positions during the strike. Many of the nurses alleged to have been denied reinstatement under the complaint's allegations are also named by the Union in connection with the grievances filed. There are also some similarities between the grievances and the allegations raised in the complaint with respect to preferential scheduling of hours in the hemodialysis department and the use of nonstriking part-time nurses in Psychiatry to work hours which could have been offered to striker Grace Labriola.

However, the General Counsel asserts that nevertheless, deferral is inappropriate in this case because two of the prerequisites to deferral under *Collyer* are missing: (1) that the unfair labor practice allegation is subject to resolution through the grievance procedure; and (2) that the Respondent indicates a willingness to have the unfair labor practice resolved through the grievance procedure, waiving any contractual time limits if necessary.[66]

The allegations in the complaint raise the issues as to whether positions awarded to nonstriking employees were, in fact, filled by permanent strike replacements, thus justifying the denial of reinstatement to striking employees, and as to whether the Respondent granted preferential treatment under the 12-month no-bumping provision to nonstriking employees. The issues raised by the grievances involve, in substance, the Respondent's compliance with the mechanics of the return to work agreement, such as order of recall and the offer of alternative positions to displaced striking employees. However, the evidence here shows that the Respondent excluded from application of the return to work procedures those positions awarded to nonstriking nursing employees pursuant to the ''individual contracts,'' thus the question as to whether a striker was properly denied reinstatement because of the Respondent's award to a nonstriker of a position in a closed hospital unit not reopened until after the strike ended would not be arbitrable under the return to work agreement. Moreover, according to the testimony of its own witnesses, the Respondent would not agree to arbitrate any grievance involving whether the nonstriking nurses were entitled to these positions because they are allegedly ''permanent replacements.''

Furthermore, the issue of the legality of the 12-month no-bumping rule accorded nonstrikers is one grounded solely in the Act and is inextricably related to the other complaint allegations which I found above to be inappropriate for deferral,[67] and it appears that the Respondent does not seek deferral of this issue under *Collyer*. Under these circumstances deferral would not only result in ''disorderly 30 proceedings and confusion,''[68] but there is also lacking a ''compelling reason for deferring one aspect of the dispute to the grievance arbitration machinery'' while necessarily deciding other complaint allegations.[69]

From all the above, I find and conclude that deferral to the grievance-arbitration machinery in this case is inappropriate and therefore I deny the Respondent's motion ''to defer to arbitration.''[70]

### 2. The 10(b) defense

Section 10(b) of the Act provides:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

The Respondent contends that certain allegations of the complaint are time-barred under Section 10(b) of the Act because the conduct alleged was not specifically set forth in a timely filed charge.[71] The General Counsel asserts that the complaint allegations, ''while perhaps not alleged verbatim in the charge, is 'closely related' to and grows out of the charge alleging that the individual contracts for these positions constituted direct dealing and that superseniority and other benefits were discriminatorily granted to strike replacements as a result of these commitments.'' The charge on which the instant complaint was issued was filed on December 31, 1986, and alleges, inter alia, that the Respondent, since on or about July 15, 1986, violated the Act by: ''Bypassing the Union to negotiate with individual employees of the Hospital'' and by

[62] *Collyer Insulated Wire*, supra at 842.

[63] *United Technologies Corp.*, supra, overruled *General American Transportation Corp.*, 228 NLRB 808 (1977).

[64] *American Commercial Lines*, 291 NLRB 1066 (1988).

[65] *Du Pont*, supra.

[66] *United Technologies*, supra at 560. The General Counsel apparently also recognizes that some of the factors set forth in *Collyer* as supporting the imposition of the Board's deferral policy exist here.

[67] *United Technologies Corp.*, supra.

[68] *American Commercial Lines*, supra.

[69] *S.O.I. Roofing*, 271 NLRB 1 (1984); *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166 (1972).

[70] *United Technologies Corp.*, supra; *Collyer Insulated Wire*, supra.

[71] The Respondent moves for dismissal and/or summary judgment on this ground with respect to par. 11 of the complaint which alleges in substance that the Respondent unlawfully failed and refused to reinstate certain striking employees whose jobs had been awarded to nonstrikers who were not physically performing the job at the conclusion of the strike.

''Discriminating against strikers by implementing super seniority and other benefits for strike replacements.'' The complaint issued on October 29, 1987, alleges that, ''Since on or about October 4, 1986, the Respondent has failed and refused to reinstate to their former positions of employment, certain of its employees . . . who had engaged in the strike . . . and on whose behalf the Union had made the unconditional offer to return to work.''

The Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307–308 (1959), held:

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *NLRB v. I & M Electric Co.*, 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board to its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *NLRB v. Jones & Langhlin*, 301 U.S. 1. Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. . . . What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left ''carte blanche to expand the charge as they miqht please, or to ignore it altogether.'' [*NLRB v. Fant Milling Co.*] 258 F.2d at 856 [5th Cir. 1958]. Here we hold only that the Board is not precluded from ''dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.'' *National Licorice Co. v. NLRB*, 309 U.S. 350, at 369.

In *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952), the Second Circuit held that, ''If a charge was filed within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are *closely related* to the violations named in the charge, and (b) occurred within six months before the filing of the charge.''

The Board in discussing the ''closely related'' test in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), stated:

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Thus, Section 10(b) of the Act requires a ''factual and legal nexus between the charge allegations and the otherwise untimely allegations that looks toward the class of violations alleged in the pending timely charge, the sequence of events, and the nature of the defenses raised.[72]

In applying these principles to the facts in this case, I find and conclude that the complaint allegations under consideration are not time-barred under Section 10(b) of the Act and therefore deny the Respondent's motion for dismissal and/or summary judgment in this regard. The charge allegations that the Respondent violated the Act by ''bypassing the Union to negotiate with individual employees of the hospital'' and by ''discriminating against strikers by implementing superseniority and other benefits for strike replacements,'' when considered in the context of what occurred, can only be construed to have reference to the individual contracts entered into between the Respondent and its nonstriking employees (crossovers and newly hired employees) for employment at the hospital. While the allegations in paragraph 11 of the complaint to the effect that the Respondent has unlawfully failed and refused to reinstate certain of its striking employees is broadly worded, yet the record shows that the essence of this allegation is that the Respondent discriminated against strikers by entering into the individual contracts with nonstrikers for specific positions which were not yet open, and for which there was no need at the time, and thereafter using these contracts or commitments to deny reinstatement to the striking employees who held the position before the strike.

The evidence in the record shows that ''the otherwise untimely allegation [in the complaint is] of the same class as the violations charged in the pending timely charge,'' namely Section 8(a)(1) and (3) of the Act, and involves the same legal theory as to whether the striking employees were unlawfully discriminated against as to their reinstatement or the lack thereof; the allegations in both the complaint and the charge arise from the same sequence of events, similar conduct during the same time period with a similar object (e.g., allegedly to discriminate against striking employees by denying them reinstatement to their former positions because of such activity), i.e, the strike, the closing of the hospital, the hospital's subsequent reopening and staffing, the strike settlement, etc.; and it would appear that the Respondent would have and did raise the same defenses and prepared and presented its case as it would similarly have done in defending against the allegations in both the complaint and the charge,

[72] *Advertiser's Mfg. Co.*, 294 NLRB 740 (1989); *Davis Electrical Constructors*, 291 NLRB 115 (1988); *Redd-I, Inc.*, supra.

that the individual contracts it made with nonstriking employees rendered positions unavailable to returning strikers and justified the Respondent's refusal to reinstate them. Thus, the complaint allegation in issue is ''closely related'' to the charge allegations that the individual contracts for these positions constituted direct dealing with employees and that superseniority and other benefits were discriminatorily granted to strike replacements as a result of these commitments.[73]

3. The reinstatement of striking employees

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate certain of its striking employees on whose behalf the Union had made an unconditional offer to return to work. The complaint also alleges that such conduct is inherently destructive of the rights guaranteed employees by Section 7 of the Act. The Respondent denies these allegations although it admits that it did not reinstate to their former positions certain striking employees (at most two and each of whom was offered and accepted another comparable position) whose prestrike positions had been awarded to replacements (including employees who abandoned the strike) who were not physically performing the duties of the position on a permanent basis as of the conclusion of the strike.

In *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), the Supreme Court of the United States held that it was not an unfair labor practice under the Act for an employer to have replaced striking employees with others ''in an effort to carry on the business,'' or to have refused to discharge the replacements in order to make room for the strikers at the conclusion of the strike.[74] The Supreme Court reaffirmed this holding in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), wherein the Court held that employers have '''legitimate and substantial business justification' for refusing to reinstate employees who engaged in an economic strike . . . when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations.'' As the Supreme Court stated in *Fleetwood Trailer*, at 378:

> Section 2(3) of the Act . . . provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by Section 7 and 13 of the Act. . . . Under Section 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to ''legitimate and substantial business justifications,'' he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. . . .
>
> In some situations, ''legitimate and substantial business justifications'' for refusing to reinstate employees in an economic strike has been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations.[75]

Moreover, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8 (1983), the Supreme Court stated that, ''The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of *NLRB v. Fleetwood Trailer Co.*, [supra], that the employer have a ''legitimate and substantial justification'' for its refusal to reinstate strikers. The Supreme Court in *Belknap* cited the Board's holding in *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), as follows:

> The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of *NLRB v. Fleetwood Trailer Co.*, [supra], that the employer have a ''legitimate and substantial justification'' for its refusal to reinstate strikers. . . .
>
> We however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in *Mackay Radio*, and cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper . . . .

and noted that, ''There are no cases in this Court that require a different conclusion.''[76]

Additionally, in *Trans World Airlines v. Flight Attendants*, 489 U.S. 426 (1989), the Supreme Court held that crossovers have the same rights as newly hired employees where they are permanently hired to replace striking employees during an economic strike,[77] and therefore the employer was not re-

[73] *NLRB v. Fant Milling Co.*, supra; *Advertiser's Mfg. Co.*, supra; *Davis Electrical*, supra; *Redd-I, Inc.*, supra; *NLRB v. Dinion Coil*, supra. Also see *Columbia Textile Services*, 293 NLRB 1034 (1989).

[74] As the Supreme Court observed in *Mackay Radio*, at 346:
> [T]he assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

[75] The Supreme Court in *Fleetwood Trailer* further stated at 379:
> A second basis for justification is suggested by the Board—when the strikers' job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example, ''the need to adapt to changes in business conditions or to improve efficiency.'' We need not consider this claimed justification because in the present case no changes in methods of production or operation were shown to have been instituted which might have resulted in eliminating the striker's jobs.

[76] In *Belknap, Inc. v. Hale*, supra, the Court also stated:
> Indeed, as the Board interprets the law, the employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired ''permanent'' replacements, that is, hired in a manner that would show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.

[77] The inclusion of both new hires and crossovers within the *Mackay Radio* rule and the *Fleetwood Trailer* case also reflects the Board's position on this

*Continued*

quired to lay off these employees in order to reinstate more senior full-term strikers at the conclusion of the strike.[78] The majority of the Court ruled that crossovers who worked during the strike and had been promised permanence were entitled to retain their jobs as a matter of law, without further factual inquiry. Therefore, it would seem that the existence of a strike and the use by the employer of a promise of permanent tenure are the only factual matters that need be established to show business justification for turning away full-term strikers seeking to reclaim their jobs by asserting seniority. And, from the Supreme Court's discussion in *Belknap, Inc. v. Hale*, supra, of the Board's decision in *Hot Shoppe*, supra, referred to in the *Trans World Airlines* case, it appears that it is not required that offers of permanent tenure to strike replacements must be justified by showing that the particular form of offer was necessary to keep a business in operation during a strike.

The Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968)[79] defined the status of replaced economic strikers as follows:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

If an employer fails to sustain his burden of proof, a refusal to reinstate employees after an economic strike constitutes an unfair labor practice notwithstanding the absence of animus or bad faith for such action since this conduct ''discourages employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act.''[80]

Additionally, in *H. & F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972), the Second Circuit held:

> When strikers have resorted to the economic weapon of endeavoring to impair production, the employer is entitled to respond with efforts to preserve it and must have *latitude in hiring replacements sufficient, but no more than sufficient to that end.* On the one hand, a mere offer, unaccepted when the striker seeks reinstatement, is insufficient to qualify; on the other, *actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date.* [Emphasis added.][81]

The General Counsel argues that the Respondent's system for reinstating the striking employees in the instant case was discriminatory on its face and inherently destructive of employee rights and therefore violative of the Act because it guaranteed to nonstriking employees, jobs which did not exist until after the strike ended and without regard to the Respondent's business needs, while conditioning the reinstatement of strikers on patient census thereby denying full reinstatement to the striking employees. As counsel for the General Counsel asserts in his brief:

> In the present case, Respondent set up a discriminatory reinstatement system which is similar to the ''Preferential Reinstatement Plan'' found unlawful by the Board and the Court in *George Banta Company, Inc.*, 256 NLRB 1197, 1218–1220 (1981), enf'd in pertinent part, 686 F.2d [10, 19 fn. 11 (D.C. Cir. 1982)]. In that case, the employer utilized a reinstatement plan which guaranteed crossover strikers the jobs they had before the strike without regard to what functions the crossovers actually performed during the strike and without regard to the employer's immediate production needs. As a result, employees who remained on strike for the duration were relegated to those vacancies left over, which tended to be low-paying and less desirable. The Employer's plan in Banta also protected crossovers from contractual bumping by more senior strikers for the term of the contract. The only distinction between the plan in *Banta*, supra, and that utilized by the Employer here is that, in *Banta*, the employer hired no permanent replacements. In the present case, the reinstatement system utilized benefitted replacements, as well as crossover strikers, by guaranteeing them the jobs and shifts of their choice without regard to patient census or other operational needs of Respondent, and without regard to whether they actually worked those jobs before the strike ended.[16]
>
> . . . .
>
> Respondent's reinstatement plan here was discriminatory on its face.

I do not agree.

issue. See the Board's brief as amicus curie (pp. 13–15) in *Trans World Airlines*, supra.

[78] While *Trans World Airlines* involved the Railway Labor Act, the Supreme Court reviewed its own cases and those of the Board under the National Labor Relations Act extensively for ''guidance'' and in support of its reasoning therein.

[79] Enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[80] *NLRB v. Fleetwood Trailer Co.*, supra; *David R. Webb Co.*, 291 NLRB 236 (1988). As the Board stated in *Zapex Corp.*, 235 NLRB 1237, 1238 (1978), enfd. 621 F.2d 328 (9th Cir. 1980):

> The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that ''once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.'' In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:
>
> The underlying principle in both *Fleetwood* and *Great Dane*, supra, that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.

Also see *SKS Die Casting & Machining*, 294 NLRB 372 (1989).

[16] Although General Counsel, in *Banta*, had alleged that the strike wag an unfair labor practice strike, the judge, the Board and the Court found that, under the circumstances, it made no difference whether the strike was an unfair labor practice or economic strike. 256 NLRB supra, at n. 4 and p. 1221. 686 F.2d supra, at 822.

[81] In the underlying case, *H. & F. Binch Co.*, 188 NLRB 720 (1971), the Board stated:

> We have held that if an employer makes a commitment to the applicant for the strikers' job, we will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins work.

Significantly, in *Banta* no permanent replacements were hired by the employer during the strike. Therefore, at the end of the strike the employer was obligated under the law of *Mackay*, *Fleetwood Trailer*, and *Laidlaw Corp.* to reinstate the striking employees and the crossovers equally, either by seniority or on some other fair and nondiscriminatory basis, or by mutual agreement. Instead, the employer utilized a reinstatement plan which, as implemented, placed the crossovers immediately into jobs they worked before the strike without regard to what functions they performed during the strike and the employer's immediate production needs. Crossovers retained and received full contractual rate retention rights to their prestrike jobs and where applicable ''contractual displaced person status.'' Returning strikers at the strike's end were in significant part recalled to lower rated positions, often required to meet tests of permanency in order to have rate retention status to higher rated jobs, and denied displaced persons machine seniority status. Further, returning strikers were precluded from ''bumping'' the crossovers under the reinstatement plan for 3 years. Thus the reinstatement plan in *Banta* was discriminatory on its face, awarding substantial priority to crossover employees. Not so in the instant case where various of the striking employees were replaced by nonstrikers ''permanently.''

In *George Banta Co. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), the United States Court of Appeals for the District of Columbia, sets forth what I perceive is the distinguishing factor between *Banta* and the instant case:

> The statutory reinstatement rights of economic and unfair labor practice strikers are identical, with one significant exception. During an economic strike—but not during an unfair labor practice—an employer may hire permanent replacements for the striking employees. See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378; *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). At the end of an economic strike, the employer is not required to discharge or lay off those permanent replacements in order to create vacancies for the employees seeking reinstatement.
>
> . . . .
>
> The distinction between the two kinds of strike is irrelevant, however, if the employer has not hired permanent replacements. In such a situation, both economic and unfair labor practice strikers have identical entitlements to reinstatement without discrimination on the basis of relative union activity.[82]

The General Counsel additionally advances the position that since the Respondent's right to hire permanent replacements ''is derivative of its rights to continue its operations during the strike,'' if a ''replacement'' is awarded a job which the hospital's current operational needs do not justify, and is instead utilized in a different capacity during the strike, then the Respondent would not satisfy its burden of demonstrating a ''legitimate and substantial business justification'' sufficient to deny reinstatement to the striking employees who held the job before the strike.

The Respondent asserts however, that it had a fundamental right to hire permanent replacements during the strike under the rationale of *Mackay Radio*, supra; that it did in fact hire permanent replacements for every available position needed to continue the hospital's operations and avoid irreversible damage, i.e., discontinuation of its accreditation and operating license under Connecticut law and/or improper and inadequate care of patients; that it offer permanent employment to the replacement employees before any of the strikers returned to work; and that, therefore the positions held by the nonstriking employees at strike's end were not available to the strikers for reinstatement.

In the instant case the Respondent assigned nonstriking employees (new hires and crossovers) the job classifications and shifts of their choice during the strike, executing ''individual contracts'' with these employees regarding such positions. However, as the record evidence shows, some of these positions were in areas of the hospital which were not opened until after the strike ended, while others were in hospital units with substantially reduced patient census. Additionally, some nonstriking employees were assigned a particular job and/or shift in which they did not work until after the strike ended. Prior to the strike, the hiring of employees was generally related to the hospital's patient census needs and the staffing and patient care requirements of the Connecticut Department of Health.

The law is clear that an employer may lawfully hire permanent replacements, including new hires and crossover employees, for striking employees during the course of an economic strike and at the end of the strike is not required to discharge or layoff such permanent replacements in order to create vacancies for the striking employees seeking reinstatement, the ''legitimate and substantial business justification'' for this being the need of the employer to continue its operations or production.[83] However, both the Courts and the Board have recognized some limitation on an employer's right to refuse reinstatement to an economic striker under the ''legitimate and substantial business justification ''rationale on the basis of a consideration of what constitutes a ''permanent replacement.'' For example, the court in *H. & F. Binch Co. v. NLRB*, supra, held that an employer may hire replacements for striking employees ''*sufficient, but no more than sufficient*'' in number to maintain production, and although actual arrival on the job or the commencement of work by the replacement is not required upon hire, there must have been an understanding reached that ''*this will occur at a reasonably early date.*''

Moreover, in *Kurz-Kasch, Inc.*, 286 NLRB 876 (1987),[84] the Board affirmed the finding of an administrative law judge that all the replacements hired by the employer during the strike were ''permanent replacements,'' notwithstanding that more replacements had been hired than there were strikers (33 replacements for 23 strikers), because the employer established its need for the greater number of replacements on the basis of incoming orders (more than there were employees to fill them), delivery schedules and the lower productive efficiency and capacity of these new employees for the strike period. In *Atlantic Creosoting Co.*, 242 NLRB 192 (1979),

[82] Also, contrast *Banta* with *Bio-Science Laboratories*, 209 NLRB 796 (1974).

[83] *NLRB v. Mackay Radio*, supra; *NLRB v. Fleetwood Trailer Co.*, supra; *Belknap, Inc. v. Hale*, supra. Also see *Trans World Airlines v. Flight Attendants*, supra.

[84] Remanded to the Board on other grounds 864 F.2d 757 (6th Cir. 1989).

an administrative law judge, affirmed by the Board, found that approximately 80 replacements hired for about 63 striking employees, were ''permanent replacements'' because of the employer's ''expectation of an initially high attrition rate'' among the replacements, and thus the need for hiring more replacements than there were strikers in order to maintain production.

Additionally, in *Kurz-Kasch*, supra, the Board also affirmed the judge's ruling that 10 replacements, hired but not scheduled to begin work until a later date were ''permanent replacements'' since the employer scheduled some of the replacements for later starting dates because it was unable to train all the replacements at the same time, and all the starting dates were scheduled before the termination of the strike. In *Superior National Bank Co.*, 246 NLRB 721 (1979), the Board held that two replacements hired before a strike was converted to an unfair labor practice strike and prior to any striker's request for reinstatement, but who did not commence working until after the conversion, were ''permanent replacements,'' since a mutual understanding had been reached and a commitment had been made at the time of hire which included the actual time when these two employees would start work.[85]

Thus, the Respondent must show a ''legitimate and substantial business justification'' for denying reinstatement to striking employees after the strike ends where during the strike, the Respondent hires replacements for the strikers in areas of the hospital which do not open for business until after the strike ends, or hires more replacements than would normally be required under the circumstances (patient census), and/or where the nonstriker does not commence working in the position awarded until after the conclusion of the strike and the Respondent's obligation to reinstate the strikers begins.

According to the record evidence, on October 4, 1986, the Union made an unconditional offer to return to work on behalf of the striking nurses and licensed practical nurses, whereupon the strike ended. At that time certain areas of the hospital such as Pomeroy 5, Pomeroy 3 (pediatrics), postpartum (WW3), Merriman II (psychiatry), and the IV therapy department, were not as yet opened. However, during the strike the Respondent had hired nonstriker replacements to fill the striker's positions in these areas and assigned such nonstriking employees, both new hires and crossovers, to other work areas and/or work assignments. At the conclusion of the strike and after the closed areas were reopened, the Respondent moved the nonstrikers into the awarded positions they were originally hired for or assigned to during the strike. I find this somewhat analogous to the circumstances present in *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981), wherein the administrative law judge, as affirmed by the Board, found:

> The Employer citing *H. & F. Binch Company*, 188 NLRB 30 720 (1971), by analogy urges that the instant commitment to striker replacements that they would ascend from on-call to part-time to full-time positions is tantamount to the preference permitted a replacement in the situation where the agreement to hire is made before the former incumbent striker unconditionally offers to return to work. I disagree. The attempted equation ignores a very real factual distinction. In situations where the preferences have been allowed, the job offer the replacement actually is vacant concurrent with the agreement to hire. *In the case at bar, the Employer's transfer commitment was made for jobs not yet available.* Preferences of the latter type are unlawful [*United Aircraft Corp.*, 192 NLRB 382 (1971), emphasis added].

The Respondent seeks to distinguish the *Lincoln Hills Nursing Home* case from the instant case in that:

> [T]here was no such [on-call] intermediate step, nor was there a promise as to a future job opening. The jobs offered to the replacements by the Respondent were vacant concurrent with the agreement to hire. Even in those few instances where a department did not open until the strike concluded, the replacements' assignments to that position was effective immediately.

I disagree. Aside from the ''intermediate step'' difference, which is of limited significance, the important and crucial focus of such a comparison must be job availability. While it is true that the nonstrikers in the instant case were hired for positions which had been occupied prior to the strike and were ostensibly vacant during the strike, these jobs were situated in areas of the hospital that remained closed during the strike and nonfunctioning. The Respondent acknowledged, as evidenced in the record, that it could not predict with any degree of certainty when these areas would reopen if at all, thus in all actuality these positions were ''jobs not yet available.'' In both *Lincoln Hills Nursing Home*, supra, and the case at bar, the nonstriking employee was promised an as yet unavailable job while being assigned to work at a different position until that job becomes available.[86] Since this did not happen until after the strike had ended and the strikers had unconditionally offered to return to work, those nonstrikers who were then placed in the position they had been awarded previously should not be considered ''permanent replacements.''

Therefore, I conclude that it was inherently destructive of strikers' reinstated rights for the Respondent to accord striker replacements preferences by awarding them positions in areas of the hospital which did not open until after the strike ended and at a time when there were striking employees with greater seniority awaiting reinstatement.[87]

[85] Also see *Southwest Engraving Co.*, 198 NLRB 694 (1972), in which the Board found that a wife who had been hired in February during a strike, along with her husband who was hired as a supervisor and whose starting dates were postponed to accommodate the husband's vacation schedule on his previous job, was a ''permanent replacement,'' although she did not start work until 2 months after the strike ended, apparently because of this accommodation. Additionally, see *Home Insulation Service*, 255 NLRB 311 fn. 9 (1981).

[86] Since the Respondent could not know when the closed hospital areas would reopen, if at all, even considering the facts in this case within the context of those cases holding that replacements are to be considered ''permanent'' even where they are not scheduled to begin work until after the strike ends, the same would be true since upon hire there could be no understanding that the employee would commence work on the job ''at a reasonably early date'' or be given an actual starting date by the Respondent. *H. & F. Binch Co. v. NLRB*, supra; *Kurz-Kasch*, supra; *Superior National Bank*, supra. Nor would any argument that these employees were in training or orientation status during that time be acceptable in this instance.

[87] *Lincoln Hills Nursing Home*, supra. In the case at bar, the recall of strikers by agreement was to occur on the basis of seniority and predicated upon patient census needs. Examples of striking employees not reinstated after the

Moreover, the same would be true of situations where ''replacements'' are awarded jobs during the strike which the hospital's operational needs do not justify and the ''replacement'' is then utilized in a different capacity during the strike. In such instances, the Respondent would not satisfy its burden of demonstrating a ''legitimate and substantial justification'' sufficient to deny reinstatement to returning striking employees. In those cases where the courts and the Board have not required ''replacements'' to be on the job when the strike ends and the strikers seek reinstatement, it has been found that ''an understanding [had] been reached'' between the employer and ''replacement'' that arrival on the job would occur either at a subsequent fixed date[88] or at a ''reasonably early date'' which might occur after the strike[89] as evidenced by the facts of the respective cases. In the instant case I do not believe that such an ''understanding has been reached.'' The Respondent acknowledged that it had not and reasonably could not set an actual date for the reopening of the closed hospital areas nor predict with some reliability when already reopened areas would expand their services. Therefore, under these circumstances, unless the ''replacement'' commenced working in the position awarded during the strike and prior to the striker's unconditional offer to return to work, the nonstriking employee would not be a ''permanent replacement'' justifying the denial of reinstatement to returning strikers.[90] Of course this would not include instances wherein the Respondent awarded positions to more nonstrikers in a hospital area than the hospital's operational needs required and some of these ''replacements'' were in training sessions or in orientation in or away from their positions or areas.[91]

Accordingly, I find and conclude from all the above that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate certain of its employees who had engaged in the strike and on whose behalf the Union had made an unconditional offer to return to work.

4. The Respondent's 12-month no-bumping provision

The complaint alleges that the Respondent violted Section 8(a)(1) and (3) of the Act by granting nonstriking employees superseniority for a 12-month period following the conclusion of the strike thereby awarding them preferences in terms and conditions of employment. The Respondent denies having violated the Act in this respect.

In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230–231 (1963), the Supreme Court struck down an employer's award of 20 years' superseniority to nonstriking employees as an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act observing:

> Super-seniority affects the tenure of all strikers whereas permanent replacements, proper under *Mackay*, affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.
>
> . . . .
>
> Unlike the replacements granted in *Mackay* which ceases to be an issue once the strike is over, the [superseniority] plan here creates a cleavage in the plant continuing long after the strike ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

The Court noted that the superseniority grant had the inherent affect of unlawfully intimidating strikers by discriminating against them in favor of nonstrikers and that the unlawful consequence could form the basis of an unfair labor practice even absent a finding of specific illegal intent. The Court found that the grant of superseniority to nonstriking employees exceeds what is necessary to protect an employer's right to continue his business operations by hiring permanent replacements and is outweighed by significant employee rights recognized by the Act, which protect their right to strike.[92]

The Respondent in its brief asserts:

> The purpose of the Rule was to make sure that permanent replacements were not themselves replaced during the recall period as a result of the return to work proposals submitted by the Respondent on September 29, 1986. These would have established in Phase II of the recall a variety of flexible and temporary methods of sharing hours among employees prior to their actual reinstatement. The proposal also contained a willingness to consider ''bumping'' as a last resort for senior nurses who had not been recalled in the normal course.

However, the credible evidence indicates that the Respondent excluded from the operation of these procedures in the return to work proposals, ''permanent replacements.'' The 12-month rule clearly states its purpose and the Union was explicitly told or led to believe that the rules protected nonstrikers from bumping for 12 months including at least

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strike ended because nonstrikers were transferred after the strike ended into positions awarded them during the strike when these hospital areas were closed are: Carolyn Fagnand (west wing 3), Marion Waller (Pomeroy 3, pediatrics), Ray Walling (AHN, Pomeroy 5), Paula Stec (Merriman II), Barbara Keane (IV therapy).

[88] *Kurz-Kasch*, supra; *Superior National*, supra.

[89] *H. & F. Binch Co. v. NLRB*, supra; *Southwest Engineering Co.*, supra.

[90] Contrast *Kurz-Kasch*, supra; *Superior National*, supra. Moreover, the Respondent would not be deprived of his right to hire permanent replacements under *Mackay* by such a ruling. It could have hired at will new nurses or licensed practical nurses or assigned crossovers to any job for which the hospital had a current or reasonably predictable need during the strike. The Respondent offered no proof that it could not successfully recruit nonstriking employees unless it offered them only those positions it awarded during the strike. While I am not convinced by the record evidence that the Respondent's reinstatement system was discriminatory on its face, I am convinced that by guaranteeing some of the nonstrikers jobs which the hospital's operational needs did not justify and instead using them in a different capacity during the strike, and after the strike returning them to the awarded position to the exclusion of returning strikers the Respondent did violate the Act.

[91] *Kurz-Kasch*, supra. For example, Ann Collins, a witness for the General Counsel, testified that at the conclusion of the strike there were more nurses in the recovery room area than would be justified by the then patient census, but that some of these nurses were at training classes.

[92] *NLRB v. Erie Resistor Corp.*, supra; *Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19 (4th Cir. 1966); *Bingham Willamette*, 282 NLRB 1192 (1987), enfd. 857 F.2d 661 (9th Cir. 1988); *Giddings & Lewis, Inc.*, 255 NLRB 742 (1981).

permanent layoff and perhaps under any circumstances.[93] Therefore, it is obvious that the rule's intended purpose and design was to insulate nonstriking employees from contracted bumping, layoffs, or other permanent reductions in force for 12 months after the conclusion of the strike and amounted to a grant of superseniority during that period based solely on whether and to what extent the employee participated in the strike.

The Respondent contends that no violation should be found based on the 12-month no-bumping provision because the issue is now moot since the 12-month period expired on October 4, 1987, and no situation arose during its effective period which required its application. However, a grant of superseniority to nonstriking employees over striking employees has a significant impact on any future collective bargaining and also tends to ''create cleavage'' between strikers and nonstrikers in the workplace which ''continues long after the strike is ended.[94] The hospital's employees were well aware of the 12-month provision, especially those who had engaged in the strike and the nonstrikers, and such knowledge would linger even after its expiration and even though it was never applied, and the so-called ''Rule'' would serve as an ever-present reminder to them of the consequences of engaging in protected activity and even act to chill the employees exercise of their right to strike at some future time. Moreover, a finding of a violation and any accompanying remedial order would have a strong deterrent effect on the repetition of such illegal practice in the future.[95]

Additionally, the Respondent asserts as an affirmative defense that the Union waived any right to protest the grant of superseniority to nonstriking employees embodied in the 12-month no-bumping provision by accepting the Respondent's final offer and submitting it for ratification to the Union's membership. In order to establish a waiver of a statutory right, there must be a clear and unmistakable relinquishment of that right. Whether there has been such relinquishment is to be decided on the basis of all the facts and circumstances surrounding the making of the contract.[96] More precisely, waivers of statutory rights ''must be clearly and unmistakably evidenced either in the terms of the parties' bargaining contract or in the nature of the prior contract negotiations.[97]

While it is true that the 12-month no-bumping provision was included in the Respondent's final offer accepted by the Union and submitted to and ratified by the Union's membership thereafter, the record evidence does not support the claim of waiver by the Union to contest the lawfulness of this provision. The Union opposed the provision when it first was proposed by the Respondent on October 1, 1986, and continued to do so until the end of negotiations and insisted on preserving its rights to pursue the unfair labor practice charges pending at the time which pertained to the Respondent's ''individual contracts'' with nonstriking employees. However, I am convinced that both the Union and the Respondent were aware that this was meant to also include the Union's right to contest the 12-month no-bumping provision as well.

The agreement which contained the 12-month no-bumping provision also included the following language:[98]

> Nothing in the agreement shall constitute a waiver of any legal rights which the hospital or Union may have . . . with regard to employees not represented by the Union.

At the ratification meeting, the union membership was told by its negotiators that the Union was challenging the 12-month no-bumping provision and the ''individual contracts'' (the award of jobs to nonstrikers and the reinstatement of the strikers) before the Board. Certainly these facts are not consistent with finding a waiver by the Union. Moreover, the Respondent and the Union included language in the agreement not to discriminate against employees based on their strike activity. Despite acquiescence by the Union to the inclusion of the 12-month no-bumping provision in the agreement, the Union maintained throughout the period after the Respondent proposed it, that the provision was unacceptable and by actual and/or constructive notice indicated its intention to test its legality before the Board.[99]

Moreover, the Respondent relies on the Union's emphasis on preserving its right to pursue ''pending charges'' before the Board as establishing a waiver of its right to challenge the 12-month no-bumping provision because there was no pending charge at the time of the agreement specifically alleging this provision to be unlawful. This is an overly restrictive consideration of what was intended as evidenced in the record. While it is true that the pending charges related mainly to the ''individual contracts'' issue and did not specifically allege the unlawfulness of the 12-month no-bumping provision, there is some interrelation between that allegation and the pending charge relating to the ''individual contracts.''[100]

As the General Counsel asserts in the brief:

> In light of the conflicting provisions of the agreement itself, the contemporaneous statements made by the Union's negotiator, and the assurances given by the

[93] Hefferman, a witness for the Respondent, testified to a limited application of the 12-month rule. However, this testimony was contradicted by his affidavit given to a Board agent during the investigatory stage of these proceedings, and by the consistent and credible testimony of witnesses for the General Counsel to the contrary. Moreover, it appears to have been the Respondent's position throughout the strike and the strike negotiations that ''permanent replacements'' would be protected in their jobs no matter what.

[94] *NLRB v. Erie Resistor Corp.*, supra.

[95] *NLRB v. Methodist Hospital of Gary*, 73 F.2d 43, 48 (7th Cir. 1984); *NLRB v. Food Workers Local 1445*, 647 F.2d 214 (1st Cir. 1981).

[96] *Rose Arbor Manor*, 242 NLRB 795, 798 (1979).

[97] *Statler Hilton Hotel*, 191 NLRB 283 (1971), and cases cited therein.

[98] The Respondent's attorney at the negotiations, Palmer, advised the union representatives that this language effectively preserved the Union's right to pursue the unfair labor practice charges file and no additional language was necessary.

[99] Compare *George Banta Co.*, supra. Contrast *Gem City Ready Mix Co.*, 270 NLRB 1260 (1984). The testimony of Barbara Larson, the Union's main negotiator, indicates that the Union's acceptance of the Respondent's final offer was for the purpose of ending the strike and getting the striking employees back to work and only accepting the 12-month no-bumping provision therein on the basis of the parties understanding that this ''Rule'' would be reviewable before the Board.

[100] Note the Respondent's assertion that the 12-month no-bumping provision was necessary to preserve the ''permanent'' status of strike replacements which was guaranteed to them by the ''individual contracts,'' and the issue of the legality of the ''contracts'' had been part of the pending charges to the Board; the Board agent investigating the charge had questioned Heffernan about the 12-month no-bumping provision alleged by the Union to be unlawful; the pending charges had been filed by the Union prior to the Respondent's proposal of the 12-month provision on October 1, 1986, as part of its final offer to the Union, although the Union could have amended its charge or filed a new one thereafter which it did not do until sometime subsequent.

> Respondent's negotiator that the language it proposed preserved the Union's right with respect to pending unfair labor practice charges, a ''clear and unmistakable'' waiver cannot be found here.

I agree.

From all the above I find and conclude that by granting nonstriking employees superseniority for a 12-month period following the conclusion of the strike thereby awarding them preference in terms and conditions of employment, the Respondent violated Section 8(a)(1) and (3) of the Act.

As regards the General Counsel's motion alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily awarding preference in the scheduling of the hours of work and shifts to nonstriking employees in the hemodialysis unit, I find and conclude that the Respondent did not engage in unlawful conduct in this respect. The Respondent had a right to hire permanent replacements for the striking employees in the hemodialysis unit and did so.[101] These employees were hired on a full-time or part-time basis with fixed amounts of hours except for overtime if any. There was therefore no obligation on the Respondent's part to lessen the hours of these permanent replacements to accommodate reinstated strikers, unless by agreement between it and the Union. Under these circumstances, the General Counsel has failed to sustain his burden of proving violative conduct on the part of the Respondent.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to offer reinstatement to the strikers who, at the compliance stage of this proceeding, are determined to have been denied reinstatement as a consequence of the Respondent's failure to reinstate them to their former or substantially equivalent jobs,[102] without prejudice to seniority or other rights and privileges, and to make each such striker whole for any loss of pay and benefits they may have suffered by reason of the Respondent's discrimination against them, such payments to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[101] *NLRB v. Mackay Radio & Telegraph Co.*, supra; *NLRB v. Fleetwood Trailer Co.*, supra.

[102] *Gilmore Steel Corp.*, 291 NLRB 185 fn. 1 (1988).

## CONCLUSIONS OF LAW

1. The Waterbury Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Connecticut Health Care Associates, District 1199, National Union of Hospital & Health Care Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent discriminated against employees in violation of Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate striking employees while according job preferences to nonstrikers over strikers.
4. The Respondent discriminated against employees in violation of Section 8(a)(1) and (3) of the Act by according job preference to nonstriking employees (new hires and crossovers) by granting these employees superseniority for a 12-month period following the conclusion of the strike.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[103]

## ORDER

The Respondent, the Waterbury Hospital, Waterbury, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate striking employees while according job preferences to nonstrikers over strikers.

(b) According job preferences to nonstriking employees by granting them superseniority for a 12-month period following the conclusion of the strike.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer reinstatement and/or backpay to any striker, who, at the compliance stage of this proceeding, is determined to have been denied reinstatement as a consequence of the Respondent's unlawful conduct in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its hospital facility in Waterbury, Connecticut, copies of the attached notice marked ''Appendix.''[104] Copies of the notice, on forms provided by the Regional Director for Region 39, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

[103] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[104] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate striking employees while according job preferences to nonstrikers over strikers.

WE WILL NOT accord job preferences to nonstriking employees by granting them superseniority for a 12-month or any period following the conclusion of a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer reinstatement and backpay, with interest, to any strikers who were unlawfully denied reinstatement as a consequence of our failure to offer reinstatement to them because we preferred nonstrikers employed during the strike.

THE WATERBURY HOSPITAL